

DOCKET FILE COPY ORIGINAL

THE BALLER LAW GROUP

A PROFESSIONAL CORPORATION

1820 JEFFERSON PLACE, N.W.

SUITE 200

WASHINGTON, D.C. 20036

(202) 833-5300

FAX: (202) 833-1180

RECEIVED

AUG 13 1998

RECEIVED
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

Writer's Direct Dial: 202-833-3301

E-Mail Address: LMeller@Baller.com

August 13, 1998

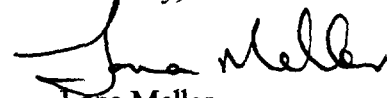
Mr. William F. Caton
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

**Re: Missouri Petition for Preemption of Section 392-410(7)
of the Revised Missouri Statutes of Missouri, CC Docket No. 98-122**

Dear Secretary Caton:

Enclosed are an original and six (6) copies of the Comments of the American Public Power Association in the Petition referenced above. An additional copy is being delivered to Janice M. Myles of the FCC's Common Carrier Bureau and to the International Transcription Services, Inc.

Sincerely,


Lana Meller

cc: Counsel of Record

No. of Copies rec'd
List A B C D E

026

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

RECEIVED

AUG 18 1998

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)

The Missouri Municipal League;)

The Missouri Association of Municipal Utilities;)

City Utilities of Springfield;)

City of Columbia Water & Light;)

City of Sikeston Board of Utilities.)

CC Docket No. 98-122

Petition for Preemption of)

Section 392.410(7) of the)

Revised Statutes of Missouri)

To the Commission:

**COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION
IN SUPPORT OF THE
MISSOURI MUNICIPALS' PETITION FOR PREEMPTION**

The American Public Power Association ("APPA") supports the Missouri Municipals' petition for preemption of Section 392.419(7) of the Revised Statutes of Missouri. APPA believes that the legal arguments presented by the Missouri Municipals are correct, complete and sufficient to warrant a ruling in their favor. APPA files these comments to lend additional weight to the policy arguments that the Missouri Municipals have raised.

APPA is the national service organization representing more than 2,000 consumer-owned, not-for-profit electric utilities in all states other than Hawaii. Approximately one of every seven Americans receives electricity from the more than 2,000 public power systems operated by municipalities, counties, authorities, states and public utility districts (collectively "municipal electric utilities" or "public power systems" for the purposes of these comments). Many large cities operate their own electric utilities, including Los Angeles, Seattle, Cleveland, Nashville,

Jacksonville, San Antonio and Austin. Three-quarters of APPA's members serve communities with populations of less than 10,000.

From the very inception of the electric power industry more than a century ago, public and private utilities have coexisted with different structures and purposes, designed to suit the needs and demands of their customers. Many public power systems developed in communities that were not large or profitable enough to attract private power companies. Residents of these communities banded together to create their own electric utilities -- recognizing that electrification was critical to their economic development and survival. Public power systems also emerged in several large cities, where residents believed that competition was necessary to lower prices, raise the quality of service, or both.

Today, the patterns that marked the evolution of the electric power industry are repeating themselves in the telecommunications industry. As private telecommunications providers focus on large, lucrative markets, many smaller communities are at risk of falling behind in obtaining the full benefits that access to advanced telecommunications services can bring in the Information Age. These benefits include the ability to attract new businesses and hold on to existing ones, the ability to provide progressive educational and employment opportunities, the ability to improve the quality and reduce the costs of health care, and the ability to achieve a high quality of life.

Many of the communities that APPA serves believe that they must rely on themselves again if they are to survive and thrive in the next century. They believe that telecommunications are as basic to modern life as electricity, water and roads, and that they must develop their own facilities to ensure that their residents will obtain prompt and affordable access to advanced telecommunications services. Public power systems are well-poised to enable their communities to help themselves in the telecommunications area.

In recent years, dozens of public power systems have upgraded their communications infrastructure to support their core business of providing electric service. Hundreds more will do so in the next few years. That is so because electric utilities need sophisticated communications facilities to meet ever-increasing demands for more efficient and reliable electric service.

The communications facilities to which public power systems have upgraded, or will upgrade, can readily support the provision of video, voice, data and other advanced telecommunications services, either by the public power systems themselves or by other providers of such services. Public power systems therefore can simultaneously help accelerate the pace of deployment of our national information infrastructure, facilitate local competition, advance universal service, and minimize wasteful, costly and duplicative burdens on streets, poles, ducts, conduits and rights of way.

Furthermore, for many public power systems and the communities they serve, this is a time of dramatic change as the electric power industry undergoes restructuring and deregulation. Congress and many states are now struggling to develop approaches that would preserve the competitive balance in the electric power industry from which the Nation has benefited greatly for decades. All electric utilities, whether investor-owned, cooperatively-owned or publicly-owned, should be able to enter into new lines of business, form alliances with telecommunications providers of their choice, and offer consumers "one-stop shopping" for energy, communications and other services, free of state barriers to entry.

APPA urges the Commission to do its utmost to eliminate all unlawful state measures, such as Section 392.419(7) of the Revised Statutes of Missouri, that may impair the ability of public power systems to engage in telecommunications activities. As the Commission has found, Section 253 "commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service." *Texas Order*, ¶ 22. For the reasons discussed in the Missouri Municipals' petition and these comments, APPA submits that Section 253 requires the Commission to afford public entities the same protections as their privately-owned entities.

Furthermore, APPA urges the Commission to grant the Missouri Municipals' petition in clear, unambiguous and forceful terms to send state and local legislators, state regulators, courts and other interested persons across the Nation a clear and unmistakable message that state and

local barriers to municipal telecommunications activities are *unlawful* under the Telecommunications Act and should be not be enacted in the first place or, if already enacted, should be eliminated without delay.

As the Commission knows, in paragraph 190 of the *Texas Order*, it urged other states not to do what Texas had done, finding that municipalities can bring “significant benefits” in accelerating the pace of facilities-based competition. Unfortunately, the Commission’s words have often gone unheeded. Emboldened by the Commission’s *action* in the Texas case rather than its *words*, some states, such as Virginia, have erected new barriers to municipal entry in the period since the Commission decided the *Texas Order*. Some states, such as Tennessee and Minnesota, have failed to act on opportunities to eliminate previously enacted barriers. Other states are considering, or are likely to consider, additional restrictive measures in the years ahead. Only decisive action by the Commission will put an end to these anti-competitive measures, once and for all – as Congress intended.

Last, APPA underscores the importance of a clear statement by the Commission that the term “any entity” in Section 253(a) includes municipalities, as such. Since municipal electric utilities typically derive their authority from, and operate as departments or offices of, the municipal governments of which they are a part, Congress must necessarily have intended to cover municipalities, as such, under Section 253(a) in order to fulfill its unmistakable intent of encouraging municipal electric utilities to play a significant role in bringing communities across the Nation rapidly into the Information Age. In any event, even municipalities that do not operate their own electric utilities can make significant contributions in providing or facilitating the provision of telecommunications services in their communities, and there is ample evidence in the legislative history cited by the Missouri Municipals to suggest that Congress intended to give them that opportunity, free of state and local barriers to entry.

APPA appreciates the opportunity to file these comments and would gladly answer questions or furnish any additional information that the Commission may desire.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "James Baller", with a stylized flourish at the end.

James Baller

Lana L. Meller

Cheryl Flax-Davidson

The Baller Law Group, P.C.

1820 Jefferson Place, N.W.

Suite 200

Washington, D.C. 20036

(202) 833-5300 (phone)

(202) 833-1180 (fax)

jimb@baller.com (Internet)

Attorneys for the
American Public Power Association

August 13, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 1998, a true and correct copy of the Comments of the American Public Power Association In Support of the Missouri Municipals' Petition for Preemption, CC Docket 98-122 has been hand delivered to:

Janice M. Myles
Federal Communications Commission
Common Carrier Bureau, Room 544
1919 M Street, N.W.
Washington, D.C. 20554

James Baller
Baller Law Group, P.C.
1820 Jefferson Place, N.W.
Suite # 200
Washington, D.C. 20036

ITS, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036


Lana Meller